MALAYSIAN REPORTS

T.O. THOMAS v. ASIA FISHING INDUSTRY PTE. LTD.

[F.C. (Suffian L.P., Lee Hun Hoe C.J. (Borneo) and Wan Suleiman F.J.) December 2, 1976]

[Kuching — Federal Court Civil Appeal No. 39 of 1976]

Practice and Procedure — Contempt of Court — Injunction — Solicitor aiding and abetting clients to commit breaches of order — Finding of fact by trial court — Appellate court will not interfere.

This was an appeal against the decision of the learned judge of the High Court in finding the appellant, an advocate, guilty of contempt of court by aiding and abetting his clients to commit breaches of a court order. The court order in this case was an injunction which had been granted by the High Court to restrain the clients of the appellant and their servants or agents from (a) disposing of or removing any property or assets of the firm of East Malaysia Sea Products Company until the trial of the action or further order (b) interfering with the respondent's use and enjoyment of the firm's factory premises. It was alleged that the appellant was liable for contempt: (1) in aiding and abetting his clients to take active steps in interfering with the respondent's use and enjoyment of the factory premises notwithstanding the court order; (2) in preventing the respondent from inspecting the factory premises.

Held: in this case as the learned trial judge had the advantage of seeing and hearing the witnesses, the appellate court should not interfere with his finding of facts;

(2) the court order in this case was clear and unambiguous and was in no way modified or suspended by the undertaking given by the clients of the appellants to operate the factory;

(3) the learned judge was correct in finding that the appellant had been guilty of contempt. The court has undoubted jurisdiction to commit for contempt a person not included in an injunction or a party to the action who, knowing of the injunction, aids and abets a defendant in committing a breach of it.

Cases referred to:-

(1) *Parashuram Detaram Shamdasani v. King-Emperor* [1945] A.C. 264, 270.
(2) *Joseph Orakwue Izuora* v. *The Queen* [1953] 1 All E.R. 827.
(3) *Tan Chow Soo* v. *Ratna Ammal* [1969] 2 M.L.J. 49, 50.
(4) *Watt v. Thomas* [1947] 1 All E.R. 582, 587.
(5) *Seaward* v. *Paterson* [1897] 1 Ch. 545.
(6) *Acrow (Automation) Ltd.* v. *Rex Chainbelt Incorporated & Anor.* [1971] 3 All E.R. 1175, 1180.
(7) *Arthur Reginald Perera* v. *The King* [1951] A.C. 482, 488.
(8) *Re Bramblevale Ltd.* [1969] 3All E.R. 1062, 1063.
(9) *Worthington & Ors.* v. *Ad Lub Club Ltd.* [1965] 1 Ch. 236.
(10) *Attorney General* v. *Butterworth & Ors.* [1963] 1 Q.B. 696.
(11) *Comet Products U.K. Ltd.* v. *Hawrex Plastics Ltd.* [1971] 2 Q.B. 67.
(12) *Debabrata Bando Padhyay & Ors.* v. *The State of West Bengal* A.I.R. 1969 S.C. 189.
(13) *S. Abdul Karim* v. *M.K. Prakash & Ors.* A.I.R. 1976 S.C. 859.
(14) *Kent Country Council & Anor.* v. *Batchelor, The Times,* 7th October 1976.
(15) *United Telephone Co.* v. *Dale* (1884) 25 Ch.D. 778, 786.
(16) *Avery* v. *Andrew* (1879) 13 Ch.D. 110, 119.
(17) *Miller* v. *Knox* (1838) 4 Bing. N.C. 574.
(18) *Fairclough & Sons* v. *Manchester Shipping Cane Co. (No. 2)* [1897] W.N. 7.
(19) *Rex v. Dolan* [1907] 2 I.R. 260.
(20) *Regina* v. *Odhams Press Ltd.* [1957] 1 Q.B. 73; [1956] 3 All E.R. 494.
(21) *Roach* v. *Garvan* (1742) 2 Ark. 469.
(22) *Ex parte Jones* (1806) 13 Ves. 237.
(23) *A.G.* v. *Walthamstow Urban District Council* (1895) 11 T.L.R. 533.
(24) *Stancomb* v. *Trowbridge Urban District Council* [1910] 2 Ch. 190.
(25) *Redwing Ltd.* v. *Redwing Forest Products Ltd.* [1968] 2 Q.B. 915.
(26) *P.A. Thomas & Co. & Ors.* v. *Mould & Ors.* [1956] 3 All E.R. 494.
(27) *Iberian Trust Ltd.* v. *Founders Trust and Investment Co.* [1932] 2 K.B. 89, 95.
(28) *Re Williamson Murray* v. *Williamson* 94 L.T. 813.
(29) *Arbuckle Smith & Co. Ltd.* v. *Greenock Corporation* [1960] A.C. 813.
(30) *Thompson* v. *Park* [1944] K.B. 408.
(31) *Re Plant, ex parte Hayward* [1881] 45 L.T. 326.
(32) *Spokes* v. *Banbury Board of Health* (1865) L.R. 1 Eq. 42 at p. 48.
(33) *Attorney-General* v. *Colney Hatch Lunatic Asylum* (1869) 4 Ch. app. 146.
(34) *Fennings* v. *Humphrey* (1841) 4 Beav. 1; 49 E.R. 237.

FEDERAL COURT.

J.N.R. Newey Q.C. (*Daniel Tajam* with him) for the appellant.

C.T. Wong for the respondent.

Lee Hun Hoe C.J. (Borneo): This is an appeal against the decision of the learned judge in finding appellant, an advocate, guilty of contempt of court by aiding and abetting Chai Tze Foh and his wife, Ha Siow Chan to commit breaches of a court order dated May 30th, 1975 ("the court order").

In granting "the court order" the learned judge relied on the sworn affidavits filed by respondent. Although East Malaysia Sea Products Co. ("the Co.") which carried on business at Lot 4479 Sungai Priok, Kuching, Sarawak had four partners only Chai and his wife were registered as partners under the Business Names Register in Sarawak. On September 1, 1973 "the Co." sold their business lock, stock and barrel to respondent ("the Singapore Co.") at an agreed price which was duly paid (see agreements at pages 91 and 100). However, due to administrative and other delays the agreements could not effectively be carried out. So, on June 24, 1974 the respondent and "the Co." and Chai entered into an operation agreement whereby Chai was appointed an executive to run the business of "the Co." (see operation agreement at page 36). On September 4, 1974 in pursuance of the agreement "the Co." acting through Chai executed a transfer of Lot 4479 in favour of East Asia Industry Sdn. Bhd. ("the Malaysian Co."), a nominee of "the Singapore Co." (See Memorandum of Transfer at pages 71 and 72). Thereafter, Chai and his wife refused to co-operate with respondent. They refused to act in accordance with the terms of the operation agreement, particularly clause 14 which provides that "In the event that this operation agreement ceases, and at request of AFI (Asia Fishing Industry Pte. Ltd.) hereafter Executive shall remove its name from the Registry of Business Names/Companies as executive Agent and Trustee of the said business." As a result the business of "the Co." had been brought to a standstill. No goods could be shipped or exported. Their action had caused tremendous loss to respondent. Since they alone could operate the bank account of

"the Co." and apply for export permits, by their action, they could cause irreparable loss to respondent. Also, the respondent's vessel had been delayed in Kuching unnecessarily. Further under the pretext of negotiating for an out of court settlement, they had dismissed all the staff of "the Co." on May 28, 1975. Their action could jeopardise the cold room of the factory where processed prawns were being stored prior to export. On May 29, 1975 they deliberately locked E. Kanaoka, director of respondent and also the staff out of the factory site. Since then Chai and his wife had been in actual occupation and possession of the premises until July 17, 1975.

By a Notice of Motion dated May 24, 1975 respondent applied *ex parte* for an injunction which was granted on May 30, 1975 restraining Chai, his wife and their servants or agents from: —

(a) disposing of or removing any property or assets of the firm of East Malaysia Sea Products Company until the trial of this action or further order;

(b) interfering with the respondent's use and enjoyment of the said firm's factory premises at Lot 4479 Section 16, Kuching Town Land District, Sungai Priok, Kuching.

On June 28, 1975 Chai and his wife through their solicitors took out a notice of motion to set aside the injunction. On July 16, 1975 the learned judge dismissed the application to set aside the injunction. On October 31, 1975 this court dismissed their appeal thereby confirming the decision of the learned judge.

One further matter relating to the undertaking should be mentioned. On June 20, 1975 as an objection was raised against Patrick Tan acting for respondent the learned judge adjourned the hearing of a motion to commit Chai and his wife for contempt to June 23, 1975. The record of proceedings shows that after Chai and his wife gave an undertaking to continue operating the factory until further notice of the court, the learned judge stated as follows: —

"In view of the protest made by counsel on behalf of the first defendant, I adjourn the hearing of this motion (to commit the first and second defendants) for contempt of court which had since been struck out) to June 23, 1975 at 11.00 a.m. Order the first defendant to send his protest in writing to SAG (State Attorney-General) immediately so that the SAG can hear both sides of the stories."

When the parties appeared on June 23, 1975 the objection was still under consideration by the State Attorney-General. Chai gave a similar undertaking. The learned judge stated as follows: —

"In view of the continued undertaking of the first defendant to operate the factory, the hearing of the motion be adjourned to July 5, 1975 at 9.30 a.m."

Subsequently, Patrick Tan withdrew from the case on July 5, 1975 and C.T. Wong took over from him. Apparently, there were two motions for hearing on that day before the learned judge. One was to set aside "the court order". This was dated June 28, 1975. Appellant submitted that the interim injunction was suspended and the matter was *sub judice*. The learned judge did not consider the submission for he stated that: —

"I will hear the motion dated June 13, 1975 this morning. I'll not hear the motion dated June 28, 1975 this morning."

The events which led to the contempt proceedings may now be set out. On the morning of July 4, 1975 Sim Teck Kui, an advocate, accompanied by Jemali, Kanaoka and Takahashi (the respondent's representatives), P.C. Chen Ted Choi, P.C. Gimmy Ann and two securicor guards went to the factory premises at Lot 4479. They reached the main gate at 10.55 a.m. It was locked. Chai refused to open the gate saying that he would like to consult his lawyer, the appellant. At about 11.15 a.m. appellant arrived in his car. As soon as he alighted from his car he told Sim and party that they had no right to enter the factory premises because he had an order from the High Court to stay "the court order". He also said that "the court order" was not valid and that Sim and his party would be committing a serious crime if they tried to enter the factory premises without the consent of Chai and his wife. Naturally, Sim asked appellant to produce the order granting the stay. Appellant replied that he did not have it with him but that Sim could check with the High Court Registry. It was further alleged that appellant proceeded to abuse Sim in the presence of members of his party, by calling him a gangster who did not observe the rule of law and a big liar who misled his clients and the police that the respondent's representatives could enter the factory premises. The appellant repeatedly urged Chai and other persons inside the factory premises to shoot Sim and his party with guns or hit them with stones if they did not have guns should Sim and his party try to force entry into the factory premises. In particular, appellant said he would like to see Sim and his party in bandages in court on the following day. Under the circumstances Sim and his party abandoned their intention to enter the premises.

Appellant denied the various allegations against him. He said he never advised his clients to disregard "the court order". On the contrary, he advised them to comply with "the court order". He said he pointed out to Sim that his clients had given an undertaking to continue to operate the factory. He told Sim that the effect of the undertaking was that the operation of "the court order" was by necessary implication suspended or modified. But, he never said that "the court order" was invalid. When Sim asked him to produce the order authorising his clients to operate the factory he told Sim to consult counsel appearing for respondent or to get a copy of the notes of proceedings from the Court Registry. Sim said he had an order and he would enter the premises by force and throw Chai and his wife out and that he had sent his men to get an axe to break open the gate. Appellant said he never called Sim a gangster. What he said to Sim was that as advocates they were officers of the court and should obey the law and keep the peace and if they did not respect the rule of law then there would be no difference between them and gangsters. Appellant said he asked Sim to give in writing that he had the right to break open the gate and take possession but he refused. Appellant then told the police that he was not telling lies but that Sim was telling a big lie if Sim insisted that he had the right to break open the gate and enter the premises.

On July 8, 1975 Sim telephoned and informed appellant that respondent's representatives would be

inspecting the factory premises and the cold room in the afternoon at 3 p.m. Appellant replied that they would not be allowed to see the cold room. Sim accompanied by Jemali and Takahashi, visited the factory premises that afternoon at 3 p.m. Chai's wife opened the main gate and escorted Sim and party to view the processing area of the factory premises. But, she refused to allow them to inspect the cold room and the stock kept therein on the ground that she had been advised by appellant not to allow them into the cold room and the office. On July 11, 1975 Jemali and Takahashi again went to the factory premises. They were again told by Chai's wife that they were not allowed to see the cold room and the office because she was so advised by appellant. On July 17, 1975, Sim, Jemali and Takahashi again went to the factory premises. When the cold room was eventually opened it was discovered that a large proportion of the frozen prawns stored therein had been removed. A survey was carried by Lloyd's surveyor.

Appellant denied that Sim informed him that they would be going to the factory. Sim did telephone him and told him of a proposal to inspect the premises. In response to the proposal appellant stated the legal position. He said an affirmative or negative answer was not called for as there was no specific request but only a proposal. He averred that he never advised either Chai or Chai's wife about permitting or refusing the inspection of the cold room. Chai's wife averred that she never met Sim or Jemali or Takahashi on July 8 or 11, 1975. None of them had asked her to be allowed to see the cold room or office. She said appellant never advised her not to allow anyone to see the office and cold room. Clearly, someone had not been truthful.

Consequently, by a notice of motion dated July 21, 1975 respondent applied for (a) an order that they be at liberty to issue a writ of attachment against T.O. Thomas, an advocate, for his contempt in aiding and abetting Chai and his wife in disobeying "the court order"; and (b) alternatively, an order to commit T.O. Thomas to Kuching prison for the said contempt. During the hearing of the motion (a) was abandoned as it was considered that (b) was the appropriate order to apply in view of the prohibitive nature of the terms of "the court order."

I would pause here to mention there are pending three civil suits involving respondent and Chai and his wife. It has been pointed out that certain issues are in dispute and that we should be cautious in our approach in the present proceedings. It is not possible to know what would be the outcome of those cases until they are heard. However, it is fair to mention that none of these suits has been filed before July 10, 1975.

It was alleged that appellant was liable for contempt: —

(1) in aiding and abetting Chai and his wife by taking active steps in interfering with the respondent's use and enjoyment of the factory premises notwithstanding "the court order."

(2) in preventing respondent from inspecting the factory premises including the cold room notwithstanding the order made in open court on July 5, 1975, both of which orders appellant had notice of by: —

(a) advising Chai and his wife to disregard "the court order";

(b) misleading respondent, Sim and others on July 4, 1975 that "the court order" had been suspended and/or set aside thereby perverting the administration of justice;

(c) inciting Chai and his wife, their servants and agents on July 4, 1975 to use violence against respondent's representatives, Sim and others;

(d) advising Chai and his wife not to allow respondent's representatives to inspect the cold room and check the stocks therein.

This is a matter which fortunately rarely arises in court. It concerns the question of an advocate accused of contempt of court by aiding and abetting a client to disobey a court order. I would like to refer to what Lord Goddard said when he delivered the judgment of the Judicial Committee of the Privy Council in *Parashuram Detaram Shamdasani* v. *King Emperor*[1] in respect of insulting statements made by a litigant or person with reference to the Bar and, in particular, to counsel appearing against him. This is what Lord Goddard said: —

"Their Lordships would once again emphasize what has often been said before, that this summary power of punishing for contempt should be used sparingly and only in serious cases. It is a power which a court must of necessity possess; its usefulness depends on the wisdom and restraint with which it is exercised, and to use it to suppress methods of advocacy which are merely offensive is to use it for a purpose for which it was never intended."

These words were quoted by Lord Tucker when delivering the judgment of the Board in *Joseph Orakwue Izuora* v. *The Queen*[2] where a barrister was convicted by the judge for contempt by absenting himself from appearing in court. In allowing the appeal Lord Tucker remarked: —

"It is not every act of discourtesy to the court by counsel that amounts to contempt, nor is conduct which involves a breach by counsel of his duty to his client necessarily in this category. In the present case the appellant's conduct was clearly discourteous, it may have been in breach of rule 11 of Order 16, and it may, perhaps, have been in dereliction of his duty to his client, but in their Lordships' opinion it cannot properly be placed over the line that divides mere discourtesy from contempt."

Many of the grounds of appeal are against the finding of facts by the learned judge. It is true that a considerable amount of evidence is documentary such as affidavits and letters. However, leave was given to cross-examine several deponents including appellant. The learned judge thus had the advantage of seeing and hearing them and was in a better position than this court to assess their credibility. An appellate court should always bear in mind the difficulty in judging a person's credibility merely from the cold print of the record. As Lord Diplock put it succinctly in *Tan Chow Soo* v. *Ratna Ammal*[3] in these words: —

"An appellate court, particularly where there is no full transcript of the oral evidence, is in a far less advantageous position to decide an issue of credibility than the trial judge who heard the evidence in full and observed the witnesses as they gave it, noting their pauses and their hesitations and any visible signs of confidence or embarrassment."

Certain principles have been laid down by the House of Lords for the guidance of appellate court on hearing of appeals from the lower courts involving question of facts. Although the decision is of persuasive value it has always been adopted here. Lord Thankerton in *Watt* v. *Thomas*[4] stated that: —

"I. Where a question of fact has been tried by a judge without a jury; and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses could not be sufficient to explain or justify the trial judge's conclusion;

II. The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence;

III. The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court.

It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, the individual case in question."

In this case the learned judge has dealt with the matter carefully and has given reasons for rejecting evidence of certain witnesses. In a case where there are two conflicting stories as to what actually happened at a particular time the learned judge is entitled to say which of the two stories is the true version, especially when he has the opportunity of seeing and hearing the witnesses. In my view in this case this court should not interfere with his finding of facts.

I think the appellant's strongest ground is that "the court order" is not clear. The reason is that the learned judge accepted from Chai and his wife on June 20 and 23, 1975 undertakings to continue to operate the factory. Therefore, appellant argued that the undertaking had impliedly discharged "the court order". Alternatively, the implication is that Chai and his wife were allowed to remain in the factory despite "the court order." The 1st limb of "the court order" is clear. It was contended that appellant was not in breach of the 1st limb but was alleged to have been in breach of the 2nd limb. It was further contended that in the case against appellant reliance was placed on the 2nd limb and not the 1st limb. On the other hand, respondent argued that the purchase price of all the properties had been paid and that Chai and his wife remained in the premises by virtue of the operation agreement. Thus, the distinction between "the Singapore Co." and "the Malaysian Co." is not relevant. The fact that the undertaking given was accepted did not mean that they had exclusive possession of the premises. It was pointed out that respondent's representatives were also occupying the factory premises until they were locked out. The learned judge understood the position when granting the injunction which was to put the parties back to *status quo*.

It is true to say that "the court order" is not directed at appellant. But, as the learned judge pointed out correctly that a stranger to an action who aids and abets the breach of a prohibitory order would be obstructing the course of justice. *Seaward* v. *Paterson*[5] is authority for the proposition that the court has undoubted jurisdiction to commit for contempt a person not included in an injunction or a party to the action who, knowing of the injunction, aids and abets a defendant in committing a breach of it. In that case a perpetual injunction was granted restraining defendant, agents and servants, from doing anything to interfere with the quiet enjoyment by plaintiff of the premises. Defendant allowed boxing entertainments to take place in the premises. The court held such to be a clear breach of the injunction. Murray who arranged the boxing contests knew of the injunction. North J. held Murray guilty of contempt. Affirming the decision of the learned judge, Lindley L.J. made these observations at page 553: —

"I agree with the counsel for the appellant that this case is of importance, and that the court ought to be very chary in committing people for contempt, particularly in cases of fanciful contempt. The court unless it is to become useless, must deal with such questions in the interest of the public, bearing in mind that the greater the power it possesses the more caution it is necessary to use in exercising it. However, the case we have now to deal with is not anywhere near the line. It seems to me a plain, straightforward case."

"The real nuisance complained of was the noise and disturbance created by the boxing performances which were taking place. Now Murray was present in court, and heard a good deal of the proceedings which led to the injunction. He says that he left the court shortly before the injunction was actually pronounced, or before judgment was given; but he knew the result, and he says so — he knew about it. Notwithstanding this, arrangements were made for having further boxing performances in September and October; and, on October 9 and 21, more boxing performances took place. Thereupon an application was made to North J., to commit Paterson for infringement of the injunction; but before that application came on Paterson turned round, and said that Murray was the person really responsible for it. Proceedings were then taken to commit Murray who was not a party to the action either first or last."

Agreeing to the dismissal of the appeal, Smith L.J. in the same case at page 557 stated that: —

"As regards the law, I have myself no doubt that if a person who knows that an injunction has been granted aids and abets in committing a breach of it the Court of Chancery has jurisdiction to commit him for contempt, although he is not a defendant in the action, and is not a person against whom the injunction has been granted. That Murray knew of the injunction is clear."

In more recent times *Seaward* v. *Paterson*[5] was cited by Lord Denning M.R. in *Acrow (Automation) Ltd.* v. *Rex Chainbelt Incorporated & Anor.*[6] to show that "it has long been held that the court has jurisdiction to commit for contempt a person, not a party to the action, who knowing of an injunction, aids and abets the defendant in breaking it. The reason is that, by aiding and abetting the defendant, he is obstructing the course of justice. The leading case is *Seaward* v. *Paterson.*"[5]

Another point raised is that in a contempt case it must be proved that appellant had a guilty mind — in the sense that he deliberately aided and abetted another to disobey a court order. Cases cited in support are *Arthur Reginald Perera* v. *The King;*[7] *Re Bramblevale Ltd.;*[8] *Worthington & Ors.* v. *Ad-Lib Club Ltd.;*[9] *Attorney-General* v. *Butterworth & Ors.;*[10] *Comet Products U.K. Ltd.* v. *Hawkex Plastics Ltd.*[11] Two Indian cases on the same point were also referred to as Indian law of contempt is substantially the same as English law which is also the basis

of our law of contempt. In *Debabrata Bandopadhyay & Ors.* v. *The State of West Bengal*[12] Hidayatullah C.J. at page 193 observed that: —

"A question whether there is contempt of court or not is a serious one. The court is both the accuser as well as the judge of the accusation. It behoves the court to act with as great circumspection as possible making all allowances for errors of judgment and difficulties arising from inveterate practices in courts and tribunals. It is only when a clear case of contumacious conduct not explainable otherwise, arises that the contemner must be punished. It must be realised that our system of courts often results in delay of one kind or another. The remedy for it is reform and punishment departmentally. Punishment under the law of contempt is called for when the lapse is deliberate and in disregard of one's duty and in defiance of authority. To take action in an unclear case is to make the law of contempt do duty for other measures and is not to be encouraged."

Sarkaria J. expressed his opinion in *S. Abdul Karim* v. *M.K. Prakash & Ors.*[13] in these words at page 863:—

"The broad test to be applied in such cases is, whether the act complained of was calculated to obstruct or had an intrinsic tendency to interfere with the course of justice and the due administration of law. The standard of proof required to establish a charge of 'criminal contempt' is the same as in any other criminal proceeding. It is all the more necessary to insist upon strict proof of such charge when the act or omission complained of is committed by the respondent under colour of his office as a judicial officer. Wrong order or even an act of usurpation of jurisdiction committed by a judicial officer, owing to an error of judgment or to a misapprehension of the correct legal position, does not fall within the mischief of 'criminal contempt'. Human judgment is fallible and a judicial officer is no exception. Consequently, so long as a judicial officer in the discharge of his official duties, acts in good faith and without any motive to defeat, obstruct or interfere with the due course of justice, the courts will not, as a rule, punish him for a 'criminal contempt'. Even if it could be urged that mens rea, as such, is not an indispensable ingredient of the offence of contempt, the courts are loath to punish a contemner, if the act or omission complained of, was not wilful."

Perhaps, I should refer to the recent case of *Kent County Council & Anor.* v. *Batchelor*[14] reported in *The Times* of October 7, 1976 where the Court of Appeal allowed an appeal by defendant against Justice Caulfield's finding that he was guilty of contempt for breach of an injunction from cutting down tree. The learned judge had directed himself properly for he said that the court had to be satisfied beyond all reasonable doubt that the defendant had wilfully and intentionally disobeyed the order of the court. However, their Lordships did not consider the evidence sufficient to warrant conviction. Lord Denning M.R. reiterated what he had said in earlier cases that: —

"A contempt of court by disobedience of an injunction was equivalent to a criminal charge. For disobedience of an injunction a man could be sent to prison for an indefinite time. On such a charge and with such consequences the burden was upon those making the charge to prove it beyond reasonable doubt."

In the matter of contempt arising out of disobedience to an order of injunction of court the test is to ask whether defendant knows of it. It need not be necessary that he should be served. Thus in *United Telephone Co.* v. *Dale*[15] Pearson J. said: —

"In no case will the court enforce obedience to its injunction by means of a committal to prison, simply upon the ground that the order has not been served, when it appears beyond all doubt or dispute that the defendant is aware that the injunction has been granted, and that it is the intention of the plaintiff to enforce it."

Key J. in *Avery* v. *Andrew*[16] expressed the same view but in stronger words: —

"What is the necessity for serving an order upon a defendant, if he knows perfectly well without that service what it is which he is bound to obey?"

Wilfully, disobeying an order of the court constituted contempt. This commonly consists in a party's doing otherwise than he is enjoined to do, or not doing what he is commanded or required to do by the process, order or decree of the court: *Miller* v. *Knox.*[17] The contempt must be wilful. An order of court must have been contumaciously disregarded. It is no good if it is casual, accidental and unintentional. *Fairclough & Sons* v. *Manchester Ship Canal Co. (No. 2).*[18]

On the question of guilty mind reference may be made as to what was said by Palles C.B. in *Rex* v. *Dolan*:[19]

"As to the law applicable to the case, there is no doubt. Actual intention to prejudice is immaterial. I wholly deny that the law of this court has been that absence of an actual intention to prejudice is to excuse the party from being adjudged guilty of contempt of court, if the court arrives at the conclusion which I have arrived at, that there is a real danger that it will affect the trial, or that absence of intention is to excuse the party from punishment. Such a circumstance as that ought, no doubt to be taken into consideration in considering the nature of the punishment to be awarded, as, for instance, whether it should be imprisonment."

This statement of the law was approved in *Regina* v. *Odhams Press Ltd.*[20] also relying on *Roach* v. *Garvan;*[21] *Ex parte Jones.*[22]

Intention is of no consequence in the matter of contempt by disobedience to a court order: *A.G.* v. *Walthamstow Urban District Council;*[23] *Stancomb* v. *Trowbridge Urban District Council.*[24] In particular, Donovan L.J. expressed his view clearly in *Re A.G.'s Application, A.G.* v. *Butterworth*[10] in these words: —

"I conceive the position, however, to be this. *Reg* v. *Odham's Press Ltd. ex parte A.G.*[20] makes it clear that an intention to interfere with the proper administration of justice is not an essential ingredient of the offence of contempt of court. It is enough if the action complained of is inherently likely so to interfere."

It is the contention of appellant that unless the language of the order or undertaking is unambiguous and clear no person should be liable for contempt. In support, *Redwing Ltd.* v. *Redwing Forest Products Ltd.*[25] and *P.A. Thomas & Co. & Ors.* v. *Mould & Ors.*[26] were cited. In *Redwing's case*[25] defendant gave certain undertakings in a passing-off action which were embodied in an order of the court. Plaintiff alleged that the undertaking had been broken and sought to have defendant's directors attached for contempt and defendant's property sequestrated. In refusing the application, Jenkins J. stated at page 390: —

"I cannot say I think that the undertakings contained in the order were clearly drawn and I cannot say I regard the questions of construction involved in them as entirely easy questions, but in my judgment, a defendant cannot be committed for contempt on the ground that upon one of two possible constructions of an undertaking being given he has broken his undertaking. For the purpose of relief of this character I think the undertaking must be clear and the breach must be clear beyond all question."

In *Mould's case*[26] plaintiffs obtained an interim injunction to restrain defendants from divulging or making use of any confidential information acquired

by them when in the former's employment. In dismissing the motion, O'Connor J. made clear that "where parties seek to invoke the power of the court to commit people to prison and deprive them of their liberty, there has got to be quite clear certainty about it." In the earlier case of *Iberian Trust Ltd.* v. *Founders Trust & Investment Co.*[27] Luxmoore J. stated that "if the Court is to punish anyone for not carrying out its order, the order must in unambiguous terms direct what is to be done."

In my view the facts in the present case are clearly very different from the three cases mentioned above and do not support appellant's contention. "The court order" is clear and unambiguous. But, appellant argued that the undertaking had in some way made "the court order" ambiguous and in the alternative had stayed "the court order." If an order or undertaking is so expressed as to be meaningless then there is of course nothing which can be enforced. If the court is satisfied that it bears a meaning which ought fairly to be in the contemplation of the person to whom the order was directed or who gave the undertaking as a possible meaning, the fact that that meaning results from a process of construction and involves a choice of possible meanings does not, in my judgment, preclude the court from enforcing the order or undertaking in the sense which the court assigns to it. If the court is satisfied that the party said to be in contempt *bona fide* believed himself bound only by a construction which the court holds to be erroneous, then the court may, for that reason, in its discretion, refuse to make an order. Alternatively, if it makes an order it may refuse to make an order for costs against that party. A person who has *bona fide* acted on an erroneous view of an order or injunction may, according to the circumstances, none the less be justly adjudged guilty of contempt in procedure or civil contempt as it is sometimes called. In the present case the learned judge had made clear that "the court order" could in no way be modified or suspended by the undertaking. Neither has the undertaking rendered "the court order" ambiguous and uncertain.

Appellant submitted that it was wrong and inappropriate for the learned judge to rely on tenancy cases in construing the phrase "use and enjoy". The learned judge stated that the phrase was judicially interpreted by Swinfen Eady J. in *Re Williamson Murray* v. *Williamson.*[28] However, the learned judge expressed his view, with respect, correctly, that *Williamson's case*[28] did not lay down any principle of law and that the phrase "use and enjoy" must be considered according to the facts of each particular case. *Arbuckle Smith & Co. Ltd.* v. *Greenock Corporation*[29] was also referred to. Appellant's submission is that that case related to a rating appeal and is a long way from what is before this court. For that case to be applicable respondent must be in occupation. But, the persons enjoying occupation were Chai and his wife as they lived and conducted business there. Respondent should refrain from interfering with the physical utilization of the factory. Under clause 13 of the operation agreement respondent must give Chai three months' notice to terminate agreement. Despite other clauses Chai was in control. The only benefit under the operation agreement for respondent was 70% of profit. Respondent certainly were not entitled to take possession of premises under the 2nd limb of "the court order." Reference was made to Stroud's Dictionary to construe the phrase "use and enjoyment". Bearing in mind that respondent's representatives had already had "use and enjoyment" of the premises before the lock out, I am content to say that there is nothing wrong with the approach of the learned judge in construing the phrase.

It was stressed that respondent's intention to take possession was quite overwhelming having regard to the evidence. Yong & Co. wrote on July 4, 1975 to the Superintendent of Police and the last paragraph of the letter reads: —

> "Our clients wish to exercise their rights as owners of the said factory and enter upon it this morning. In case there may be a breach of the peace we request that you despatch some police officers to the site to prevent any unpleasant happening."

Then there is in paragraph one of the affidavit of Sim Teck Kui that they went there "with the intention to take over the possession of the premises." The question of intention was not dealt with by the learned judge for he took the view that under the 2nd limb of "the court order" respondent had not only the right to enter the factory premises but also to inspect the cold room where the frozen prawns were stored. It is true that Chai and his wife were occupying the factory premises at the material time. The learned judge was aware of this as he referred to this in his judgment and stated that "the said court order and the undertaking to operate the factory could exist side by side without interference." He had clearly in mind the position of the parties before respondent's representatives were locked out of the factory premises resulting in the making of "the court order" to put the parties back to the position before the lock-out.

Obviously, at the gate strong words were used by Sim and appellant but the language used by the latter was alleged to be abusive. It is a question of which side to believe. The learned judge is clearly the best person to resolve the conflict. He found it preposterous that Sim would threaten to break down the factory gate in order to force his way into the factory premises and to throw both Chai and his wife out in the presence of the two police constables, two "securicor" guards and others. The learned judge made "the court order" and accepted the undertaking with the knowledge that both could exist side by side. The incident became serious because as the learned judge said of the stand taken by appellant that "the court order" has been stayed or suspended and respondent had no right to have access to the factory premises. The learned judge did not believe that appellant would adopt a conciliatory attitude towards Sim and respondent's representatives.

The learned judge pointed out that appellant made no complaint about the threat the following day when hearing resumed. Instead, appellant asserted that "the court order" was suspended and that the matter was *sub judice.* On that same day respondent submitted a list of names of persons allowed to go into the premises to inspect the same making it clear that the learned judge had ordered that the list might be amended subsequently.

To this appellant replied on July 8, 1975: —

"... to say that the inspection of the factory, as we understand the order of court, did not include inspecting stocks.

To do proper inspection of stocks it will be necessary to go through the accounts as well. Our Mr. Thomas did emphasize that the plaintiffs authorised agents will have the right to go into the factory and inspect the factory, which is different from opening cold store for checking of stocks.

We await directions."

The learned judge made clear he did not wish to enter into correspondence with regard to this matter. The whole conduct of appellant in the matter seems to be inconsistent with the argument that "the court order" is ambiguous. He tried but failed to get it set aside. If he thought it was ambiguous he should have applied on behalf of his clients to have it altered with reference to the undertaking. The true fact is that "the court order" had never been suspended or stayed. Yet, appellant asserted that the court had made an order staying "the court order." He was referring no doubt to the undertaking which did nothing of the kind. Because "the court order" was still effective and to prevent similar incident arising the learned judge ordered on July 5, 1975 that the names of the respondent's representatives to enter the premises be listed. As a matter of courtesy Sim telephoned appellant of the intention to inspect the factory and cold room. In answer appellant said they would not be allowed to see the cold room. His explanation that what Sim said was merely a proposal is clearly not true. He knew the list was approved by the learned judge. His letter of July 8, 1975 is self-explanatory — that although they had the right to go into and inspect the factory they could not open the cold room and check the stock therein. This argument is all the more strange as the 1st limb of "the court order" is clear and unambiguous. If respondent could not inspect and check the stocks there would be nothing to prevent Chai and his wife from disposing and removing the stocks as prohibited by the 1st limb on precisely the same ground that "the court order" was suspended or stayed. In the circumstances the learned judge did not believe that appellant had not advised Chai and his wife to disallow respondent's representatives to inspect the cold room.

It was submitted that the various allegations against appellant were not true and that even if some were true they did not amount to contempt. A person should only be found guilty of contempt in a clear case. To be guilty of contempt guilty mind must be proved, *e.g.* deliberate defiance of a court order. Advocates and solicitors owe certain duties to their clients. But, they must not forget their overriding duties to the court as officers of the court in the administration of justice. On behalf of appellant it was submitted that giving wrong advice could not be contempt. Finally, it was pointed out that the learned judge should take into account the apology made by appellant in imposing sentence. An apology must be sincere and unconditional. It must be made as early as possible to merit consideration. A mere expression of regret is not an apology. An apology tendered at a late stage may be considered as an afterthought intended merely to avoid punishment. The court has power to reject an apology which is not satisfactory.

Respondent submitted that Chai had no right at all to dismiss the staff and to lock out respondent's representatives. The granting of the injunction was, therefore, to put the parties back to *status quo*. The undertaking to operate the factory did not give Chai and his wife exclusive possession. Since respondent had bought the business, the factory, particularly the cold room, had to be kept running otherwise the frozen prawns would become bad. The injunction was granted to enable the respondent to use the premises as before the dismissal and lock-out. In *Thompson* v. *Park*[30] plaintiff and defendant each owned a school. By an agreement the two schools were amalgamated and plaintiff licensed defendant to enter with some twenty-five boys on plaintiff's school. Differences having arisen plaintiff informed defendant that, after the end of the Christmas term, 1943, he would not allow defendant to return with his boys and requested him to remove his furniture from plaintiff's premises. On defendant's failing to do so, plaintiff did it himself. In January defendant forcibly re-entered the premises. Held, that, even on the assumption that plaintiff had been guilty of breach of contract, defendant was only a licensee and that, as plaintiff had revoked the licence defendant was a trespasser and had no right to re-enter the premises or remain on them, his remedy, if any, being for damages for breach of contract, and an interim injunction must be granted to restrain defendant from further trespass and ordering him to remove his furniture and pupils.

The situation in the present case is the reverse in that Chai and his wife had disposed of everything in the business and were allowed to remain in the premises under the operation agreement to run the factory but took upon themselves to dismiss the staff and lock out respondent's representatives from the premises. Appellant contended that the *status quo* to be preserved was the situation after the lock-out not before. Lord Goddard in that case was emphatic when he said at page 410: —

"The status quo that could be preserved was the status quo that existed before these illegal and criminal acts on the part of the defendant. It is a strange argument to address a court of law that we ought to help the defendant who has trespassed and got himself into these premises in the way in which he has done and to say that that would be preserving the status quo and a good reason for not granting an injunction."

Appellant took the point that the 2nd limb of "the court order" was suspended by virtue of the undertaking given by Chai and his wife to continue to operate the factory. The learned judge was at great pains to explain that "the court order" was not suspended by the undertaking. The undertaking was specific. The respondent accepted it as was to their interest to keep the factory going to prevent damage to the frozen prawns. The respondent's representatives had the "use and enjoyment" of the factory premises before they were locked out. There was no reason why respondent could not have the right to the "use and enjoyment" of the premises and other assets except perhaps the living quarters occupied by Chai and his wife. Further, I can see no reason why they should be prevented from inspecting or checking the stock of frozen prawns in the cold room. Chai and his wife were only in the premises by virtue of the operation agreement to run the factory. Chai and

his wife had in fact disposed of all their interests in the business. For running the factory under the operation agreement he was entitled to certain percentage of profit. That was all. He was there merely as an agent or trustee for respondent. Thus, Chai had no justification at all to preclude respondent or their representatives from the "use and enjoyment" of their own properties and from inspecting the cold room or checking the stocks therein to see that the 1st limb was not breached. The learned judge rightly concluded that the undertaking given by Chai and his wife to continue operating the factory on June 20 and 23, 1975 had not and could not have the effect of staying or suspending "the court order." If appellant chose to wear blinkers no one could prevent him from doing so. He did more than merely giving advice. He went to the premises and took an active part in seeing that "the court order" was disobeyed. He also used abusive language against another advocate in the presence of others, quite unbecoming of a member of the legal profession. "The court order" had clearly given respondent the legal right to enter the premises but not to turn Chai and his wife out for otherwise how was it possible for respondent to have the "use and enjoyment" of the premises. For myself I have not the slightest doubt it was as a result of his presence in aiding and abetting Chai and his wife that they disobeyed "the court order". The case against appellant is not that he has given bad advice but for his interference by aiding and abetting Chai and his wife to deliberately disobeying "the court order". The undertaking was clear. Yet, he insisted that it had suspended "the court order". There was nothing to prevent Chai and his wife from using the premises in continuing to operate the premises but that did not give them the right to prevent respondent from the "use and enjoyment" of the premises and to lock out the respondent's representatives. Appellant had deliberately and contumaciously regarded "the court order" to be ineffective because of the view he took of "the court order". As "the court order" was never suspended it must be obeyed. No member of the public must be allowed to violate it either by interfering with the officers of court in enforcing it or by assisting those who are bound by it. The matter becomes even more serious when an advocate aids and abets those (who may be his clients) who are bound by a court order to disobey it. If appellant contumaciously set "the court order" at nought he would have to answer to the court. He cannot save himself from the consequences of his act. In *Re Plant, Ex parte Hayward*[31] a solicitor representing a debtor prevented a receiver from properly collecting debts from the debtor by offering him an indemnity. In holding the solicitor guilty of contempt, Cotton L.J. said: —

"It is not for giving bad advice that the solicitor is to be held liable but for his interference. It has been clearly shown that the order of the court was stopped to some extent from having effect by what was done. The proper method, if the order was not considered to be right, was to apply to have such order altered. The solicitor, however, did not take that view of the case. He in fact said to the receiver. 'Do not act under that order, but do as I tell you to do, and I will indemnify you from the consequences of your disobedience.' That appears to me to have been a contempt of court."

The undertaking was accepted by respondent because it was of mutual benefit. It should not be construed to give Chai and his wife exclusive possession. Neither, should it be construed in such a way as to abrogate respondent's right under "the court order" to the "use and enjoyment" of the premises. If the appellant was right that the undertaking had the effect he attributed to it then it would render both limbs of "the court order" ineffective. Both the undertaking and "the court order" could exist side by side. Both limbs of "the court order" must be obeyed. I cannot say that the learned judge was wrong to express the view that appellant had exceeded his duty as an advocate in the circumstances and that the submission he made on July 5, 1975 concerning the effect of the undertaking was an attempt to justify his conduct outside the gate of the factory the day before.

In *Spokes* v. *Banbury Board of Health*[32] an injunction was granted on March 6 restraining a local board of health from causing or permitting sewage, or water polluted therewith, to pass through drains or channels under their control into a river, to the injury of the plaintiff, a miller, residing about three miles below the outfall of the works of the local board. Execution of the order was stayed till the 1st of July. However, after July 1 they did not stop the flow of sewage into the river. They said that they had not as yet discovered any mode of deodorizing the sewage and that compliance with the order was practically impossible and would expose them to proceedings. They would also infringe an Act of Parliament. They said that there had been no wilful default and that a sequestration would be ineffectual. It would compel members of the board to resign. Held, that there had been a gross and wilful contempt, and sequestration ordered to issue. In delivering his judgment, Sir W. Page Wood V.C. made these pertinent observations: —

"... the simple and only view is, that an order must be obeyed, and that those who wish to get rid of that order must do so by the proper course of an appeal. So long as it exists, the order must be obeyed, and obeyed to the letter and any one who does not obey it to the letter is guilty of committing a wilful breach of it, unless there be some misapprehension which all mankind are subject to, and which may mislead him upon the plain reading of the order. But, in this case, that the order is plain there is no doubt."

It was argued that that case was concerned with a perpetual injunction. A person against whom an injunction has been awarded and who disregards it, is liable to be dealt with for contempt whatever the nature of the injunction may be and whether it is mandatory or restraining in its form, and whether it be made *ex parte* upon hearing both sides or be interim or perpetual. With respect, the learned judge was right to find appellant guilty of contempt in aiding and abetting Chai and his wife to disobey "the court order."

When an injunction has been made against a person appellant cannot aid and abet that person to flout it for that will be contempt. That person can appear in court and contest the injunction by asking the court to vacate it. Contempt of court arises on the wilful disobedience of the injunction whether it is made with or without jurisdiction. The question whether "the court order" has been suspended or modified is a matter for the court to decide when it

is properly before the court. This is not a matter for appellant to arbitrarily so construe. Where a plaintiff has proved his right to an injunction against a nuisance or other injury, it is no part of the duty of the court to inquire in what way the defendant can best remove it. See *Attorney-General* v. *Colney Hatch Lunatic Asylum.*(33) "The court order" has never been discharged. There is no question of the undertaking suspending "the court order". An order even irregularly obtained cannot be treated as a nullity, but must be implicitly obeyed, until by proper application it is discharged. This view is supported by authority. In dealing with the contention that the original order had been erroneously granted in *Fennings* v. *Humphrey*(34) Lord Langdale M.R. said: —

"It is clear, that a party who is served with an order may be guilty of contempt for disobedience, in a case in which the order ought not to have been made. He is not to determine for himself, but ought to come to the court for relief, if advised that the order is invalid."

Nothing is more incumbent upon the courts than to preserve their proceedings from being misrepresented; nor is there anything of more pernicious consequence than to prejudice the minds of the public against the courts.

As to the burden of proof the learned judge directed himself properly by satisfying himself beyond reasonable doubt that appellant had wilfully and intentionally aided and abetted Chai and his wife to disobey "the court order". The behaviour of appellant was contumacious. The learned judge has been careful in this case. It must be a difficult decision for him to make since a member of the legal profession was involved. As to sentence, I think the learned judge is right to impose a fine instead of a term of imprisonment.

For reasons given, I would dismiss the appeal with costs here and in the court below.

Suffian L.P. and **Wan Suleiman F.J.** concurred.

Appeal dismissed.

DES RAJ v. KIDAR NATH

[A.C.J. (Abdoolcader J.) March 12, 1975]
[Ipoh — Civil Appeal No. 45 of 1973]

Practice & Procedure — Set-off — Claim by appellant against respondent for $12,125 in earlier proceedings — Discontinuance thereof — Court granting order barring appellant from filing any further proceedings in respect of claim of $12,210 — Claim against appellant for $4,500 — Whether appellant could set-off $12,125 against claim in view of court order.

In an earlier suit, in High Court Civil Suit No. 744 of 1969, the appellant claimed against the respondent for the sum of $12,210 being moneys due and payable by the respondent to the appellant. The defence and reply were filed and delivered but by an order dated December 17, 1970 and made on an application by the appellant for leave to discontinue, the appellant was granted leave to discontinue the action "upon the term that the plaintiff does not file any further proceedings of any kind in any way whatever relating to the present claim or the subject-matter thereof or otherwise howsoever."

In the present claim, the respondent's claim against the appellant is for the sum of $4,500 paid by the respondent to the appellant's son at the appellant's request on or about 2nd April, 1969. The appellant admitted this claim but claimed in his defence to set-off against the moneys claimed a sum of $12,125 being moneys paid to the respondent by the appellant from time to time to be held by the respondent on behalf of the appellant for the latter's use. The Sessions Court accepted the respondent's submission that the appellant was debarred from pleading set-off as a defence in view of the order dated December 17, 1970. The appellant appealed and contended that the learned President had failed to consider that a set-off had already occurred and that the sum of $4,500 had already been appropriated towards the amount owed by the respondent to the appellant before the latter's claim became enforceable by virtue of the order of December 17, 1970. In this connection, the appellant referred to the defence in which the respondent had pleaded that out of the aggregate sum received by him from the appellant he had paid at the appellant's request a sum of $4,500 to the appellant's son.

Held, dismissing the appeal: (1) it is settled law that the sum set-off must have accrued due at the commencement of the action and all proper defences may be set up in reply, for example, infancy or limitation;

(2) by virtue of the discontinuance of the High Court Civil Suit by the appellant, the subject matter of that suit and all matters pleaded in the pleadings therein were never adjudicated and no effective appropriation had accordingly ever been made as all matters in issue remained at large;

(3) the very wide terms of the order of December 17, 1970 would also preclude any consideration of any set-off.

[**Editorial Note:** In this case the appellant appealed to the Federal Court (F.C. Civil Appeal No. 13 of 1975) and the appeal was dismissed on September 10, 1975 (Gill C.J. (Malaya), Ali and Wan Suleiman F.JJ.). There was no written judgment].

Case referred to:-

(1) *Smith* v. *Betty* [1903] 2 K.B. 317.

CIVIL APPEAL.

J.S. Sandu for the appellant.

L. Harcharan Singh for the respondent.

Abdoolcader J.: The respondent sued the appellant in the Sessions Court at Teluk Anson for the sum of $4,500 paid by him to the appellant's son at the request of the appellant on or about April 2, 1969. The appellant admitted this claim but pleaded in his defence to set-off against the moneys claimed a sum of $12,125 being moneys paid to the respondent by the appellant from time to time to be held by the respondent on behalf of the appellant for the appellant's use.

The respondent at the hearing before the Sessions Court contended that the appellant was debarred from pleading set-off as a defence to the respondent's claim as the amount alleged to be owing to the appellant by the respondent was unenforceable, and relied for this purpose on an Order dated December 17, 1970, in Ipoh High Court Civil Suit No. 744 of 1969. This Order was the result of the institution of proceedings by the appellant against the respondent in Penang Civil Suit No. 398 of 1969 (which was subsequently transferred to Ipoh as Ipoh High Court Civil Suit No. 744 of 1969) for the sum of $12,210 being moneys due and payable by the respondent to the appellant as set out in the particulars thereto. The defence and reply were filed and delivered but by an Order made on December 17, 1970, on an application by the appellant as plaintiff for leave to discontinue that action, he was granted leave to discontinue the action "upon the term that the plaintiff does not file any further